TENNESSEE DEPARTMENT OF REVENUE
REVENUE RULING #00-39

WARNING

Revenue rulings are not binding on the Department. This presentation of the ruling in a redacted form is information only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Departmental policy.

SUBJECT

The application of sales and use tax to the installation of property.

SCOPE

Revenue rulings are statements regarding the substantive application of law and statements of procedure that affect the rights and duties of taxpayers and other members of the public. Revenue rulings are advisory in nature and are not binding on the Department.

FACTS

The taxpayer is a [STATE OTHER THAN TENNESSEE] corporation. The taxpayer sells, installs, and rents tangible personal property at wholesale and retail in Tennessee. A portion of the taxpayer's sales in Tennessee are made to customers who will have the tangible personal property installed by the taxpayer. Certain items installed by the taxpayer remain tangible personal property following installation, while other items become part of the realty upon being installed. In most cases, the taxpayer will contract with an independent contractor to actually perform the installation, and in some cases the tangible personal property to be installed is pulled from the independent installer's inventory.

The taxpayer has presented the following transaction:

> A customer enters the taxpayer's retail establishment and purchases the installation of tangible personal property. The customer requests that the taxpayer install the tangible personal property. The taxpayer contracts with an independent contractor to complete the installation. The independent contractor maintains its own stock of this type of tangible personal property, removes the tangible personal property from its personal inventory, and installs it for the customer. The taxpayer prepares a sales invoice to bill the end customer. The independent contractor prepares a sales invoice to bill the taxpayer. Both invoices reference the tangible personal property, as well as the installation services.

The taxpayer requests a ruling on the sales and use tax consequences of this transaction, both when the item remains tangible personal property following installation and when the item becomes part of the real property upon installation.[1]

QUESTIONS

For both types of installation, that in which the property remains tangible personal property following installation and that in which the property becomes part of the real property upon installation:

1. Does the transfer of tangible personal property from the taxpayer to the customer constitute a retail sale upon which the taxpayer must collect sales tax from the customer?

2. Is the installation service provided by the taxpayer to the customer subject to sales tax?

3. Is the taxpayer or the independent contractor liable for use tax on tangible personal property removed from the independent contractor's inventory for use in completing the installation?

4. Should the installation charge be separately stated on the invoice from the independent contractor to the taxpayer and on the invoice from the taxpayer to the customer?

5. Can the taxpayer contract with the independent contractor to transfer all sales and use tax compliance requirements to the independent contractor?

RULINGS

1. The transfer is a taxable retail sale if the property remains tangible personal property following installation.

   The transfer is not a taxable retail sale if the property becomes part of the real property upon installation.

2. The installation service is subject to sales tax if the property remains tangible personal property following installation.

[1]Whether the tangible personal property installed remains tangible personal property after installation or becomes part of the realty must be determined on a case by case basis by applying the law of fixtures to the particular factual circumstances that exist. The taxpayer has not asked for that determination to be made in this ruling. The taxpayer has only asked about the tax consequences flowing from the two different types of installation.

The installation service is not subject to sales tax if the property becomes part of the real property upon installation.

3. When the property remains tangible personal property following installation, sales tax is due on the sale and installation of the property pursuant to Rulings 1 and 2. In those cases, neither the taxpayer nor the independent contractor is liable for use tax on the property removed from the independent contractor's inventory.

   When the property becomes part of the real property upon installation, both the taxpayer and the independent contractor are liable for tax on the cost price of tangible personal property that is installed. However, neither is liable for use tax to the extent that sales or use tax has previously been paid on the property. Thus, either the taxpayer or the independent contractor, but not both, will pay the tax. Both remain liable until the tax is paid.

4. If the property remains tangible personal property following installation and the price for the tangible personal property exceeds $1,600, then the installation charge must be separately stated in order to properly apply the single article cap on local sales and use tax. If the property becomes part of the real property upon installation, then there is no need to separately state the installation charge.

5. No.

ANALYSIS

1. – 3. The transaction at issue involves the installation of tangible personal property. The tax consequences of such installation sales differ depending on whether the property remains tangible personal property following installation or becomes a part of real property.

Sales and Use Tax Rule 27 states the following about charges for the installation of tangible personal property:

> (1) Charges for installing tangible personal property, whether made as a part of and in connection with the sale of the tangible personal property, or whether made for installing tangible personal property which has been sold in a separate bona fide transaction when the property remains tangible personal property when installed are subject to the Sales and Use Tax. The tax is due from the dealer, regardless of whether the dealer, or someone acting for him, installs the property. Tangible personal property which is sold and attached to real property, but which will ordinarily be removed by the owner or tenant, such as window air conditioning units, curtain and drapery rods, gasoline pumps, etc., shall be deemed to be personal property and the installation charges therefor shall be subject to the Sales or Use Tax.

> (2) Charges made for installing tangible personal property which becomes a part of real property, are not subject to the Sales or Use Tax. The person so installing the property shall be liable for any Sales or Use Tax that may be due, if any, on the property bought and/or used in making the installation.

Tenn. Comp. R. & Regs. 1320-5-1-.27; see also T.C.A. ə 67-6-102(23)(F)(vi).

If the property installed in Tennessee remains tangible personal property, then not only is the installation charge a taxable service, but the transfer of the property constitutes a retail sale subject to tax. T.C.A. § 67-6-202; 67-6-102(24)(A).

If the property installed in Tennessee becomes a part of the realty, then the following provisions apply:

> (b) Where a contractor or subcontractor hereinafter defined as a dealer uses tangible personal property in the performance of the contract, or to fulfill contract or subcontract obligations, whether the title to such property be in the contractor, subcontractor, contractee, subcontractee, or any other person, or whether the title holder of such property would be subject to pay the sales or use tax, except where the title holder is a church, private nonprofit college or university and the tangible personal property is for church, private nonprofit college or university construction, such contractor or subcontractor shall pay a tax at the rate prescribed by § 67-6-203 measured by the purchase price of such property, unless such property has been previously subjected to a sales or use tax, and the tax due thereon has been paid. The exemption provided for herein for private nonprofit colleges or universities shall apply only to the state portion of the sales tax. The sales or use tax levied by this chapter shall not apply to carpet installed for a church when the church is exempt from sales or use taxes under § 67-6-322.
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> (c) The tax imposed by this section shall have no application where the contractor or subcontractor, and the purpose for which such tangible personal property is used, would be exempt from the sales or use tax under any other provision of this chapter. However, the transfer of tangible personal property by a contractor who contracts for the installation of such tangible personal property as an improvement to realty does not constitute a sale, except as provided in § 67-6-102(8), and the contractor shall not be permitted on this basis to obtain the benefit of any exemptions or reduced tax rates available to manufacturers under § 67-6-206 or § 67-6-102(24)(E). Each location of a taxpayer will be considered separately in

> determining whether the taxpayer qualifies or is disqualified as a manufacturer at that location.

T.C.A. § 67-6-209(b) and (c).

Thus, if the property becomes a part of the realty, the person who contracted to perform the installation must pay tax on the cost of the tangible personal property installed as well as any material used to make the installation.[2] This tax is imposed on persons who contract to install the property regardless of whether the property is owned by another. However, credit should be taken for sales or use tax that has previously been paid on the item or materials used.

Applying these provisions to transactions in which the taxpayer sells and contracts to install property that remains tangible personal property following installation, it is clear that the transaction constitutes a retail sale of tangible personal property plus the sale of a taxable service. Accordingly, the taxpayer must collect from its customer, and remit to the state, sales tax on both the sale of the property and the installation charge.[3] The taxpayer should separately state and collect sales tax on both components of the sale, the charge for the property and the charge for installation.

In contrast, when the property becomes part of the realty upon installation, such installation does not constitute a retail sale of the property to the taxpayer's customer or the sale of a taxable service. Instead, the person contracting to install the property is the user and consumer of that property in fulfilling his or her contract. Under the facts provided, both the taxpayer and the independent contractor enter contracts to install the property. Both are therefore subject to tax under T.C.A. § 67-6-209(b) to the extent tax has not previously been paid on the property that is installed. *See Woods v. The M.J. Kelley Company*, 592 S.W.2d 567 (Tenn. 1980)(holding that the concept of use is not confined to physical manipulation of the property, but extends to the utilization of property for profit-making purposes.) Consequently, either the taxpayer or the independent contractor, but not both, will pay the tax. Both remain liable until the tax is paid.

4. As discussed in the preceding section, when the property remains tangible personal property upon installation, sales tax will apply to the sale of property as well as

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[2] Unless the transaction falls within the exemption for church or private nonprofit college or university construction or some other statutory exemption.

[3] Similarly, when the property remains tangible personal property following installation, the independent contractor is selling the property as well as the installation service to the taxpayer. However, a retail sale is defined as "a taxable sale of tangible personal property or specifically taxable services to a consumer or to any person for any purpose *other than for resale*...." T.C.A. § 67-6-102(24)(A)(emphasis added). The sale from the independent contractor to the taxpayer will qualify as an exempt sale for resale. To qualify for this exemption, however, a sale for resale must be made in strict compliance with the rules and regulations promulgated by the Commissioner of Revenue. *Id.*; *Upper East Tennessee Distributing v. Johnson*, No. 03A01-9701-CH-00011, 1997 WL 243503 (Tenn. Ct. App. May 13, 1997) *perm. app. denied*. To receive the sale for resale exemption, then, the taxpayer must present the independent contractor with a valid resale certificate and otherwise comply with Tenn. Comp. R. & Regs. 1320-5-1-.62 and 1320-5-1-.68.

the installation. This is true whether or not the installation charge is separately stated. If the installation charge is separately stated, it will be taxed as a specifically taxable service under T.C.A. § 67-6-102(24)(F)(vi). If not separately stated, then the charge will be included in the sales price[4] of the tangible personal property, which is also subject to tax.[5]

However, under T.C.A. § 67-6-702, the local option sales and use tax applies to the first $1,600 on the sale or use of any single article of personal property.[6] This single article cap does not apply to the sale of services. Therefore, to properly apply the single article cap, the taxpayer must separate the installation charge from the charge for tangible personal property on the invoice.

Also as discussed in the preceding section, when property becomes part of the realty upon installation, there is no taxable retail sale to the ultimate consumer of either the tangible personal property or the installation service. Instead tax must be paid by the taxpayer or the independent contractor on the property that is installed and on the materials used in the installation. Accordingly, there is no need to separate the charge for installation from the charge for tangible personal property.

5. Under T.C.A. § 67-6-501, "every dealer making sales…of tangible personal property…or furnishing any of the things or services taxable under this chapter, is liable for the tax imposed by [the Retailers' Sales Tax Act]" and "[t]he tax shall be collected from the dealer…." The taxpayer cannot, by contract or otherwise, transfer its legal obligation for the proper payment of sales and use tax to any other entity.

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[4] T.C.A. § 67-6-102(26)

[5] Under Tenn. Comp. R. & Regs. 1320-5-1-.62, "<sale for resale' means those whereby a supplier of materials, supplies, equipment and services makes such tangible personal property or services available to legitimate dealers actually selling such property or services *as such*…." (emphasis added). Accordingly, if the taxpayer wishes to purchase the installation service from the independent contractor on a resale certificate (see footnote 3), then the installation charge should be treated consistently on the invoice from the independent contractor to the taxpayer and on the invoice from the taxpayer to the customer.

[6] "Single article" is defined, in pertinent part, as "that which is regarded by common understanding as a separate unit exclusive of any accessories, extra parts, etc., and that which is capable of being sold as an independent unit or as a common unit of measure, a regular billing or other obligation." T.C.A. § 67-6-702(d). The definition further provides that "[s]uch independent units sold in sets, lots, suites, etc., at a single price shall not be considered a single article." *Id.*

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